Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al., *Appellants,*

v.

JOHN C. MOE, Individually and in his Official Capacity as Sheriff in and for the County of Missoula, Montana, et al., *Appellees.*

On Appeal from the United States District Court for the District of Montana

JURISDICTIONAL STATEMENT ON CROSS-APPEAL

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On Appeal from the United States District Court for the District of Montana

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JURISDICTIONAL STATEMENT ON CROSS-APPEAL

STATEMENT

Two separate suits were filed in the court below by the Confederated Salish and Kootenai Tribes and various members. Not all defendants nor plaintiffs were identical in both cases. Each case was heard by the

same three-judge district court. The first, from which appellees take this cross-appeal, involved application of Montana's cigarette tax statutes to tribal members on the Reservation (the cigarette tax case, hereafter *"Moe"*). The second involved application of Montana's personal property tax statutes to tribal members on the Reservation (the personal property tax case, hereafter *"Montana"*). Judgment in each was entered on March 19, 1975 (Appendix, pp. 89-95 to the single jurisdictional statement filed by appellants in *Moe* and *Montana,* No. 74-1656, hereafter referred to as "App."). Notices of appeal in each case were filed by certain defendants in both cases on May 6, 1975 (App., pp. 99-106), and by the remainder of the defendants in both cases on May 15, 1975 (App., pp. 107-114). The single jurisdictional statement covering both cases was filed by all defendants below on June 30, 1975, No. 74-1656. The personal property tax case, *Montana,* is not involved in this cross-appeal. Plaintiffs below in the personal property tax case, *Montana,* and appellees here in the cigarette tax case, *Moe,* have filed this day a motion to affirm the decisions involved in the main appeal.

OPINIONS BELOW

The three principal opinions of the three-judge district court in the cigarette tax case, *Moe,* are not yet reported and are set forth in Appellants' Jurisdictional Statement (App., pp. 11-35, 37-71, 73-86). That court's unreported Memorandum of March 19, 1975, is set forth in Appendix A, *infra,* pp. 1a-2a (hereafter "Cross-App."). The unreported Opinion of the court below in the companion personal property tax case, *Montana,* is set forth in Appellants' Jurisdictional Statement (App., pp. 3-10).

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

This action was initiated to declare invalid and to permanently enjoin the application to the cross-appellants[1] of the cigarette excise tax statutes of the State of Montana (Revised Code of Montana, R.C.M., 1947, §§ 84-5606 through 84-5606.31 (App., pp. 214-227)). The three-judge district court below, invoked pursuant to 28 U.S.C. § 2284, declared invalid and permanently enjoined the enforcement of those statutes to the extent they required members of the Confederated Salish and Kootenai Tribes residing on the Flathead Indian Reservation to possess state cigarette vendors' licenses and to the extent they applied to cigarette sales within the Reservation by tribal members to Indians who resided within the Reservation. The court, however, denied on the merits full declaratory and injunctive relief, by holding the statutes could be enforced to the extent of requiring plaintiffs and other tribal members who sell cigarettes on the Flathead Reservation to precollect the Montana state cigarette tax imposed on non-Indian purchasers. It is this latter portion of the judgment of which cross-appellants seek summary reversal, or, in the alternative, full review by this Court.

The judgment of the three-judge district court (App., pp. 89-91) was entered on March 19, 1975. Notices of appeal were filed by certain of the defend-

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[1] Plaintiffs below were the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and three named tribal members, each suing on his or her own behalf and on behalf of all tribal members. All bring this appeal except one named member-plaintiff, Joseph Anthony Wheeler, Jr., who died during the course of proceedings below.

ants below on May 6, 1975 (App., pp. 99-102), and by the remainder on May 15, 1975 (App., pp. 107-110). A notice of appeal to this Court (Cross-App., B, *infra*, pp. 3a-4a) was filed by plaintiffs below, cross-appellees here, on May 16, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. Jurisdiction is believed sustained by *MTM, Inc.* v. *Baxley,* 43 U.S.L.W. 4442 (U.S. Mar. 25, 1975)

CONSTITUTIONAL PROVISIONS, THE TREATY AND FEDERAL AND STATE STATUTES INVOLVED

Appellants' appendix sets forth the relevant provisions of the United States Constitution (App., p. 127), the Treaty of Hell Gate (App., pp. 117-124), and pertinent state statutes (App., pp. 214-227).

QUESTION PRESENTED

Whether the State of Montana has jurisdiction over members of the Confederated Salish and Kootenai Tribes residing on the Flathead Reservation to force them to precollect state cigarette taxes on sales to non-Indians.

STATEMENT OF THE CASE ON CROSS-APPEAL

The United States, by the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (App., pp. 117-124), reserved for the "exclusive use and benefit" of the Salish and Kootenai Tribes a tract of land now within the State of Montana and known as the Flathead Indian Reservation. Article II of the Treaty prohibited residence by any white men within the Reservation except those employed by the Indian Service or those obtaining the permission of the Tribes and the Reservation

superintendent. This exclusiveness of the Flathead Reservation was preserved and underscored by Congress in the Montana Territorial Act of May 26, 1864, 13 Stat. 85, 86, and in section 4 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677, which required the state to disclaim all right, title and interest to the Indian lands within its borders. The state did so by section 2 of Ordinance I, Montana Constitution. The Reservation was opened to non-Indian entry by the Act of April 23, 1904, 33 Stat. 302, as amended. In 1935, the Tribes organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, *et seq.*

Prior to April, 1972, former plaintiff Wheeler (now deceased), a member of the Tribes, leased from the Tribes two tracts of land within the Reservation held in trust by the United States, one in Missoula County, the other in Lake County. Wheeler established retail stores on both sites, where he sold cigarettes. He did not possess a cigarette vendor's license issued by the State of Montana, § 84-5606.3, R.C.M., 1947 (App., p. 218), and he neither affixed the state cigarette tax stamps, as required by § 84-5606, R.C.M., 1947 (App., p. 216), nor did he precollect the state cigarette sales tax, as required by § 84-5606 and § 84-5606.10, R.C.M., 1947 (App., pp. 214-216, 220). The Tribes control the resale of cigarettes on the Reservation by tribal members and charge an administrative fee therefor. The Tribes are authorized by their Constitution to tax cigarette sales within the Reservation, but have not done so to date.

On April 13, 1972, deputies from the Sheriff's Office, Missoula County, raided Wheeler's store located in that county and arrested him for selling unstamped

cigarettes and for not possessing a vendor's license. They raided the store again on April 20, 1972, and seized 1,350 cartons of unstamped cigarettes. On both occasions the deputies tore down signs on the premises advertising the cigarette sales.

Also on April 13, 1972, deputies of the Sheriff's Office of Lake County raided Wheeler's store located in that county and arrested cross-appellee Clinkenbeard on identical charges.[2]

Suit was initiated on April 25, 1972, in the United States District Court for the District of Montana, Missoula Division, by the Tribes, the Tribal Chairman and Wheeler and Clinkenbeard, on behalf of themselves and all tribal members, to declare invalid and to enjoin enforcement of the state cigarette tax statutes, and any regulations promulgated thereunder, with respect to tribal members who sold cigarettes within the Reservation. Plaintiffs below maintained that enforcement of the state laws was (1) a violation of the United States Constitution, Art. I, sec. 8, cl. 3, whereby Congress is given the exclusive power to regulate commerce with Indian tribes; (2) an abridgement of the Treaty of Hell Gate; and (3) inconsistent with the limited jurisdiction which Montana asserts over the Tribes by virtue of Public Law 83-280.[3] On the basis of the constitutional claim, a

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[2] The facts preceding this footnote are recited in the Supplemental Order and Opinion of the District Court dated February 3, 1975 (App., pp. 11, 14), and its Order and Opinion dated May 9, 1974 (App., pp. 37, 40).

[3] Act of August 15, 1953, 67 Stat. 588. The district court agreed, and appellants have not contested the holding, that Montana has assumed only a limited civil jurisdiction over the Tribes on the

(continued on next page)

three-judge court was convened pursuant to 28 U.S.C. § 2284, and it presided throughout the course of proceedings below.

The district court entered four opinions in this case. The first, a *per curiam* Memorandum Opinion dated October 10, 1973 (App., pp. 73-86), held invalid, as applied to tribal members residing on the Reservation, the state statutes requiring a cigarette vendor's license. The court also held that tribal members residing on the Reservation were not subject to the state cigarette sales tax. The court directed that supplemental briefs be filed on whether the state laws applied to cigarette sales if the purchaser was a non-Indian.

The court issued a second Order and Opinion dated May 9, 1974 (App., pp. 37-71), reaffirming its earlier holding, but also deciding that the laws of the state did apply to sales by Indians to non-Indians and that tribal members were required to precollect the tax for the state. However, one judge now dissented. The defendants below moved for a rehearing based on the dissenting opinion and the case was reopened for further discovery and hearing.

The district court issued a third Supplemental Order and Opinion dated February 3, 1975 (App., pp. 11-35), in which it summarized the essence of the discovery (App., pp. 12-16), reached conclusions about the importance of federal and tribal contributions to

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(continued)
Reservation, and that that limited jurisdiction does not include the power to tax tribal members on the Reservation. The lower court's discussion and holding, which rely on *Kennerly* v. *District Court*, 400 U.S. 423 (1971), appear in its Opinion and Order dated May 9, 1974 (App., pp. 37, 49-50), and its Memorandum Opinion dated October 10, 1973 (App., pp. 73, 82-83).

the "economic well-being of the Reservation", including services beneficial to non-Indians and "many programs unique to tribal government" (App., p. 16), and reaffirmed its opinion of May 9, 1974.

The court's final expression came in a Memorandum (Cross-App., *infra*, pp. 1a-2a) issued simultaneously with its Judgment of March 19, 1975 (App., p. 89). In that Memorandum the court recognized, in connection with its ruling that Indians on the Reservation selling to non-Indians had to precollect the state tax, that "its holding will result in complicated problems of enforcement by the State of Montana" (Cross-App., p. 1a). The court continued:

> "We think it preferable to await a final ruling of the Supreme Court on the validity of the cigarette excise tax imposed by the State of Montana with respect to sale to both Indians and non-Indians before attempting to resolve the enforcement problems. Obviously the solution will depend upon the Court's holding on the validity of the tax. . . ." *Id.*

THE QUESTION PRESENTED ON CROSS-APPEAL IS SUBSTANTIAL

The question presented by this cross-appeal is substantial because the district court's decision is so clearly inconsistent with the controlling decisions of this Court as to require summary reversal or, in the alternative, full review and decision.

Three times the court below, once without dissent, held firmly that tribal members were not subject to the state vendor's license requirement or to the cigarette sales tax directly. It properly read *Williams* v. *Lee*, 358 U.S. 217 (1959), as clearly holding that business

transactions on an Indian reservation involving an Indian are not subject to state laws, absent Congressional assent. The court also correctly applied the teaching of *Kennerly* v. *District Court,* 400 U.S. 423 (1971), and held that Montana has not assumed general civil jurisdiction over members on the Reservation. The court then aptly confirmed that *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164 (1973), foreclosed Montana from asserting jurisdiction over tribal members requiring them either to possess a state cigarette dealer's license or to pay the cigarette sales tax in Reservation transactions.[4]

The court, however, despite this consistent and controlling case law and despite rejection of appellants' other contentions below,[5] did not view the requirement that tribal members act as state tax-collecting agents for sales to non-Indians as an unconstitutional or un-

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[4] App., pp. 51-52. Appropriately, the district court was not diverted from the clear meaning of these cases by the fact that Montana expends some state tax moneys within the Flathead Reservation and that Indians may thereby benefit to an imprecise degree along with non-Indians. The court noted that Arizona likewise spends tax moneys on the Navajo Reservation but that fact does not alter the result that Arizona cannot tax Navajo Indians on their Reservation. *McClanahan* v. *Arizona State Tax Comm'n, supra,* at 173, n. 12.

[5] The court rejected arguments: (i) that the tax exemption enjoyed by tribal members amounted to a denial of equal protection and due process to non-Indian citizens of the state (Opinion of February 3, 1975, App., pp. 17-19); (ii) that section 6 of the General Allotment Act of 1887, 24 Stat. 389, 390, 25 U.S.C. § 349, authorized Montana to tax at least those tribal members who had received allotments which had passed into fee status (Opinion of February 3, 1975, App., pp. 19-20); and (iii) that 28 U.S.C. § 1341 precluded federal court consideration of this entire case (Opinion of May 9, 1974, App., pp. 41-47).

authorized imposition upon the members or as an interference with tribal self-government.

Williams v. *Lee, supra,* laid down the test that when state involvement with an Indian reservation reaches the point of interfering with tribal self-government, that involvement becomes impermissible. 358 U.S. at 220. The district court recognized this test, but simply misapplied it.

The Montana statutory scheme contemplates purchase of cigarettes for resale and affixing of the state tax stamp thereto only by licensed wholesalers and licensed retailers, §§ 84-5606.11 and 84-5606.12, R.C.M., 1947 (App., p. 220). The value of the tax stamp is to be added to the cost of the cigarettes by the retailer (or wholesaler) and recovered from the ultimate consumer, § 84-5606.10, R.C.M., 1947 (App., p. 220). Thus, any tribal member who seeks to retail cigarettes to non-Indians under the state's scheme must prepay the tax in the first instance to his wholesaler when he purchases the cigarettes for his store.

Therefore, he has been taxed, and he has suffered a measurable out-of-pocket loss because he has been forced to pay money to a sovereign that has no jurisdiction over him, and he has been forced to do this as a pre-condition to operating an independent business under tribal regulation. This is a gross interference with freedom from state regulation, even if he can recoup the money he had to advance interest-free for state purposes.[6] He has been made an involuntary agent of the state to precollect taxes owed by non-Indians.

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[6] He may never recover the tax paid for any number of reasons that would result in the loss of stock, from theft to spoilage.

In addition, the court's ruling collides directly with tribal self-government, for if the Tribes ever seek to exercise their tribal constitutional authority to impose a tribal cigarette sales tax on the merchandise, they would be seriously disadvantaged, for their tribal retailers would be forced to collect not only the tribal tax, but the state tax as well. Recognition of this fact is a deterrent to the Tribes to impose their own tax, which precludes raising much-needed revenue.

The involuntary monetary burden placed on the Indian retailer, and the *de facto* disadvantage the Tribes face in exercising their full constitutional authority, make it clear the decision below sanctions an infringement of tribal self-government that is not permitted. *Williams* v. *Lee, supra.*

The lower court's decision also is at odds with *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U.S. 685 (1965). There, a non-Indian who traded with Indians on the Navajo Reservation was held to be exempt from the Arizona gross proceeds tax, basically because of federal pre-emption in the field of Indian commerce. Here, the Indian commerce involves Indians selling to non-Indians. Surely, if a non-Indian is exempt from state tax laws because of Indian commerce, then an Indian also is exempt.

Finally, the lower court left unanswered this Court's proposition in *McClanahan* v. *Arizona State Tax Comm'n, supra,* that Arizona had no jurisdiction to enforce its tax:

> "Arizona, of course, has neither amended its constitution to permit taxation of the Navajos nor secured the consent of the Indians affected. In-

deed, a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. § 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. See Brief for Appellee 24-26.[19] But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected. Cf. Tr. of Oral Arg. 38-39. Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, cf. *Ward* v. *Board of County Comm'rs,* 253 U.S. 17 (1920), the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case."

* * * * * * * * *

"[19] In light of our prior cases, appellee has no choice but to make this concession. See, *e.g., Kennerly* v. *District Court,* 400 U.S. 423 (1971); *States* [sic] v. *Kagama,* 118 U.S. 375 (1886)." (411 U.S. at 178-179)

It is precisely so here, for the state has not assumed general jurisdiction over tribal members on the Reservation and there is no way the state can enforce the tax laws in question. Jurisdiction is the power to compel and the state lacks that power here.

CONCLUSION

Jurisdiction should be noted and the decision below, holding that Indians selling cigarettes to non-Indians on the Flathead Reservation are subject to state jurisdiction and laws, summarily reversed. In the alternative, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Civil No. 2145

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al., *Plaintiffs*,
v.
JOHN C. MOE, et al., *Defendants*.

Memorandum

Before: BROWNING, *Circuit Judge*, and SMITH and JAMESON, *District Judges*

PER CURIAM:

The defendants have objected to the inclusion of paragraph 3 in the judgment proposed by plaintiffs. In turn plaintiffs have moved the court to add subparagraph 1(e). The subject matter of these provisions was not specifically presented or considered by the court.

The court recognizes, as suggested in plaintiffs' memorandum in support of their motion to add subparagraph 1(e) and prior briefs of both parties, that its holding will result in complicated problems of enforcement by the State of Montana. The court and all counsel, however, have recognized that this is a test case. We think it preferable to await a final ruling of the Supreme Court on the validity of the cigarette excise tax imposed by the State of Montana with respect to sale to both Indians and non-Indians before attempting to resolve the enforcement problems. Obviously the solution will depend upon the Court's holding on the validity of the tax. If the parties are then unable to agree upon the subject matter of the proposed provisions, they may be resolved in appropriate proceedings in which all parties will have an opportunity to pre-

sent evidence and their views on proposed enforcement procedures.

Accordingly we have concluded that with this understanding plaintiffs proposed paragraph 3 and subparagraph 1(e) should not be included in the judgment.

Plaintiffs have agreed that paragraph 2 may be modified as proposed by counsel for defendants State of Montana and William A. Graff, Acting Director of the Department of Revenue. Inasmuch as both parties prevailed in part, the judgment has been modified to provide that each party will bear his or its own costs.

Done and dated March 19, 1975.

/s/ JAMES R. BROWNING
James R. Browning
United States Circuit Judge
/s/ WILLIAM J. JAMESON
William J. Jameson
United States District Judge
/s/ RUSSELL E. SMITH
Russell E. Smith
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

(Caption omitted in printing)

Notice of Appeal

(Filed May 16, 1975)

Notice is hereby given that all plaintiffs named in the caption set forth above, except Joseph Anthony Wheeler, Jr. (who is deceased), hereby appeal to the Supreme Court of the United States from that portion of the final judgment of a three-judge district court entered in this action on the 19th day of March, 1975, that

> (1) Denied plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment to the extent that defendants could require plaintiffs and other tribal members who sell cigarettes on the Flathead Reservation, Montana, to precollect the Montana state cigarette tax imposed on non-Indian purchasers pursuant to Chapter 56, Title 84, R.C.M. 1947, and regulations promulgated by those statutes; and
>
> (2) Consequently denied to plaintiffs, as requested in their complaint and motion for summary judgment, permanent injunctive relief restraining defendants from imposing any requirements of Chapter 56, Title 84, R.C.M. 1947, and regulations promulgated by those statutes, upon plaintiffs or other tribal members who sell cigarettes on the Flathead Reservation to non-Indians, such denial of permanent injunctive relief being a resolution by the court of the merits of plaintiffs' constitutional claims.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: May 8, 1975

Respectfully submitted,

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Appellees.

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APPELLEES' MOTION TO AFFIRM

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IN THE

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Appellees.

On Appeal from the United States District Court
for the District of Montana

APPELLEES' MOTION TO AFFIRM

Appellees move the Court to affirm the portion of the judgment sought by Appellants to be reviewed on the ground that the question presented does not require further argument. In the alternative Appellees move the Court to note jurisdiction of the question presented by this appeal together with the questions presented by the Appellants in companion cause No. 74-1656, October Term, 1974, *John C. Moe, Individually and in his Official Capacity as Sheriff in and for the County of Missoula, Montana, et al., Appellants v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, et al., Appellees, and The State of Montana, et al., Appellants v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, et al., Appellees.*

I.

Appellants[1] seek review of a portion of the final judgment issued by the three-judge statutory court in the cigarette tax case, Civil No. 2145, (hereinafter *Moe*) upholding validity of certain statutes of the State of Montana requiring state taxes on sales of cigarettes made on the Flathead Reservation to non-Indian purchasers. Other portions of the decision of the same court in the *Moe* case and in the companion property tax case (Civil No. 74-40-M) are the subject of the appeal brought by Appellees herein in October Term, 1974, Cause No. 74-1656.

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[1] Appellants, plaintiffs in the Court below, are named as Appellees in the appeal in Cause No. 74-1656.

II.

The decision of the three-judge court, on the specific issue raised by this appeal, was correct.[2] The essential premises asserted by Appellants in support of their appeal do not withstand scrutiny. The state tax involved is not a tax upon the Tribes or upon Indians. Collection of the tax from non-Indians does not interfere with or even involve tribal self-government.

III.

The retail outlets at which cigarettes were sold were not operated by the Tribes but by individual Indians. (App. p. 40, 58-59).The plaintiffs are not licensed traders comparable to those in *Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). Sales to non-Indians are not required (App. p. 53). Tribal self-government intended for protection by *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959) simply is not involved.

The tax is not upon the Indian seller but upon the ultimate non-Indian purchaser (R.C.M. 1947, Section 84-5606.10,

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[2] The questions presented in the Jurisdictional Statement in appeal No. 74-1656 relate directly to the questions of claimed immunity of certain Indians on the Flathead Indian Reservation from state taxation. We respectfully refer the Court to the arguments presented in the Jurisdictional Statement in Cause No. 74-1656 in support of the alternate motion presented here.

App.p. 220). In this case Indian sellers purchased cigarettes from wholesalers which were in turn sold at retail without tax stamps affixed (App. p. 40). There was in fact no requirement that the Indian seller prepay the tax to the wholesaler when he purchased cigarettes for resale.

Sales to non-Indians without collection of the tax invites violation of criminal law by the non-Indian purchaser (R.C.M. 1947, Section 84-5608.18, App. p. 222). Neither *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) nor any other decision of this Court suggests that such a result would find judicial acceptance.

CONCLUSION

Jurisdiction should be noted and the portion of the judgment below to which this appeal is directed should be affirmed. In the alternative probable jurisdiction should be noted and all issues in this appeal and No. 74-1656 should be set for argument.

Respectfully submitted,

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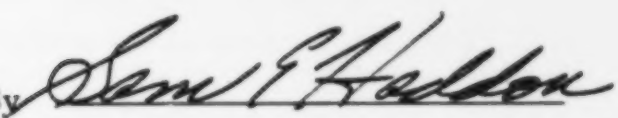
By 

Attorneys for Appellees

CERTIFICATE OF MAILING

I, SAM E. HADDON, one of the attorneys for Appellees certify that on the 6th day of August, 1975, I served three copies of the foregoing APPELLEES' MOTION TO AFFIRM on each of the counsel for Appellants herein by mailing true copies thereof, first class postage prepaid as follows:

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and first class air mail postage prepaid as follows:

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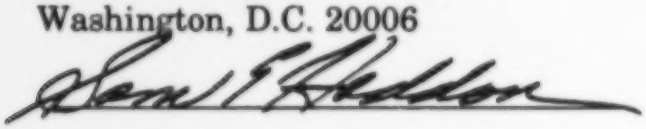

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